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United States
COURT OF APPEALS
for the Ninth Circuit

BRADY-HAMILTON STEVEDORE CO.,
a corporation,

Appellant,

v.

WATERMAN STEAMSHIP CORP.,

Appellee,

WATERMAN STEAMSHIP CORP.,

Appellant,

v.

MATSON TERMINALS, INC.,
a corporation,

Appellee.

BRIEF OF APPELLEE MATSON TERMINALS, INC.

*Appeal from the United States District Court
for the District of Oregon*

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JURISDICTION

Cross-Appellee Matson Terminals, Inc. (Matson) adopts the statements of jurisdiction set forth at pages 1 and 2 of the Brief of Respondent-Appellant Brady-

Hamilton Stevedore Company (Brady) and at pages 1 and 2 of the Brief of Libellant-Appellee Waterman Steamship Corp. (Waterman).

STATEMENT OF THE CASE

The statement of the case set forth at pages 2-4 of Brady's brief is correct, except that it was uncertain whether longshoreman Booker T. Campbell was using a tag line or his hands to guide the deep tank cover as it was being raised (R., Ex. 3, 46, 47, 48).

With respect to Brady's liability to Waterman, Matson also accepts and adopts the statement of facts set forth at pages 6-10 of Waterman's brief.

Since the existence or non-existence of Matson's liability to Waterman is solely a question of fact, additional facts which support Matson's position on this appeal are set out below in the section entitled "Argument".

SUMMARY OF ARGUMENT

1. Waterman did not sustain its burden of proving that Matson inadequately lighted the lower 'tween deck space.

2. The trial judge made the following findings:

"[T]he lack of adequate lighting, if such was the fact, was not a causative factor in the workman's fall and resulting injuries. It is my finding that the sole and only cause of such injuries was the negligence of Brady in failing to properly replace the

hatch boards and the unseaworthy condition resulting therefrom." (R., Vol. 1, 22)

The Court's finding that inadequate lighting did not contribute to longshoreman Campbell's accident was not "clearly erroneous", and was in fact correct.

ARGUMENT

A. Preliminary Statement.

Waterman's cross appeal is limited to contentions (1) that Matson failed to light the lower 'tween deck adequately, and (2) that this failure was a contributing cause of Campbell's injuries. If the record requires that both of these contentions be deemed established, then Matson is liable to Waterman by reason of the indemnity clause in its stevedoring contract (R., Ex. 31, Paragraph 12(3)), and also by virtue of a breach of its implied warranty of workmanlike performance. If, however, there was no evidence of inadequate lighting, or if Judge Kilkenney's finding (R., Vol. 1, 22) that Brady's negligence alone caused the accident was not clearly erroneous, then Matson cannot be held answerable to Waterman and the judgment of the lower court should be affirmed. Authorities which define the scope of appellate review of disputed findings of fact in admiralty cases are discussed at length in pages 5 and 6 of Waterman's brief. See, e.g., *McAllister v. United States*, 348 U.S. 19, 20, 75 S. Ct. 6, 99 L. Ed. 20 (1954); *Pacific Towboat Co. v. United States Corporation of Delaware*, 9th Cir., 276 F.2d 745, 752 (1960).

B. The Record Does Not Require and Would Not Support a Finding That Lighting Was Inadequate at Place of Accident.

Judge Kilkenney found that "lack of inadequate lighting, if such was the fact, was not a causative factor in the workman's fall and resulting injuries." (R., Vol. 1, 22). Accordingly, he was not required to make a finding on the issue of adequacy of lighting, although his opinion contains the following statement, which in context is no more than an "arguendo":

"The record, although sketchy and indefinite, probably supports a finding that Matson failed to properly light the area in which the longshoremen were working. The testimony and report of its walking boss point in that direction." (R., Vol. 1, 21).

The only testimony with respect to lighting was furnished by the injured longshoreman, Campbell, the assistant walking-boss, Glavanich, and an attorney for Waterman, Lester H. Clark, who investigated the accident shortly after it happened. Of these, only Campbell was on the lower 'tween deck at the time of his accident. Glavanich went below deck when he received word of the injury (R., Ex. 32, 12, 58).

The accident occurred on January 26, 1961, at 4:05 P. M. (R., Ex. 32, 7, 8; Ex. 7). Campbell was a member of a gang assigned to uncover the No. 3 aft hatch and begin a loading operation in the hold (R., Ex. 32, 5). When the after sections of the deck level and upper 'tween deck hatch squares had been removed (R., Ex. 32, 8, 10), Campbell and other members of his gang descended to the lower 'tween deck (R., Ex. 3, 13, 17).

Their purpose was to assist in removing the covers from two aft deep tanks in the hold (R., Vol. 2, 7-10, R., Ex. 3, 24, 25, R., Ex. 32, 10, 33-45).

Campbell testified that one hatch light was rigged on the inshore side of the hatch opening. It was suspended on a cord from the main deck level, and had a large field attached (R., Ex. 3, 13-16). Campbell could not remember how high the light was positioned, whether at the main deck level or below the 'tween deck level (*id*, 16). He recollected that it was "more to the top", but was unable to give any answer when asked what this meant (*id*, 16). He testified that some areas of the lower 'tween deck were dim, but not dark, without specifying any specific areas (*id*, 18). He further testified that there was "some light" in the lower 'tween deck space, and "guessed" that it was from the hatch light (*id*, 17).

Campbell appears to have had no recollection whether he did or did not look at the hatch boards in the lower 'tween deck area before he started to work. It was usual to look around an area before working and Campbell testified that he did look (*id*, 25, 26) but he said:

"I couldn't say that I looked all through." (*id*, 26)

He could not recall whether he had "walked around or just stood in one place and looked." (*id*, 26). There was also testimony as follows:

"Q. Well, did you look around the area at all to see what was in this lower 'tween deck when you first got down there?

MISS REDLAND: Do you mean looking in

the wings or what?

MR. CLARK: Looking generally around the whole area of this whole 'tween deck to see what was in there and what was not in there?

THE WITNESS: I can't recall that." (*id*, 23)

Campbell did testify as follows:

"Well, I looked as far as I could see; as far as I could see, they [the hatch boards] was on. I thought they was on and that is all I can remember. (*id* 23)."

Glavanich, the assistant walking-boss, went down to the lower 'tween deck space shortly after the accident (R., Ex. 32, 7). He found a single hatch light, which was lying on one of the tank covers (*id*, 11, 25, 26). Since this was not the position of the light as described by Campbell, one may infer that it had been moved by a workman after the accident. The light was burning, and the reflector was turned up to provide a broad field of illumination (*id*, 26).

Glavanich, who had twelve years' experience as a walking boss and thirty years' experience as a stevedore (*id*, 4), testified repeatedly that one hatch light of the kind used, if properly suspended, plus daylight filtering through the hatch, would give adequate lighting under the conditions existing at the time of the accident (*id*, 15, 16, 27, 28, 29, 30, 31, 32, 40). Since Glavanich was not in the lower 'tween deck area at the time of the accident, he could not testify that the rigging of the light was proper at that time (*id*, 31, 58).

An accident report which Glavanich prepared from

notes made shortly after the occurrence recites that Campbell was injured while “. . . walking around unlighted L/T/Deck” (R., Ex. 7, Ex. 32, 7, 8). However, Glavanich knew only what was told to him by the gang members (R., Ex. 32, 58). As noted above, Campbell testified that the lower ’tween deck was lighted.

The testimony given by Waterman’s attorney, Mr. Clark, added nothing to that of Campbell and Glavanich. He stated that there was one cargo light in the lower ’tween deck space, which had been moved to facilitate Campbell’s removal from the area (R., Tr. 5, 12).

The testimony of Campbell, Glavanich and Clark most certainly does not *compel* a finding that Matson failed to light the floor hatch area of the lower ’tween deck space properly. Neither does it prove, to the contrary, that the hatch area was adequately lighted. Campbell’s memory proved faulty. The testimony of other members of the gang working in the ’tween deck area was not preserved, or, if preserved, was not introduced at the trial of this case. The fairest summary of the evidence is that it establishes nothing with respect to adequacy of lighting. A failure of proof however, defeats any recovery by Waterman against Matson since Waterman had the burden of establishing that illumination of the ’tween deck space was insufficient.

C. The Record Supports a Finding that Inadequate Lighting Did Not Contribute to Campbell’s Injury.

Negligence does not exist apart from cause and effect. *The Chester Valley*, 5th Cir., 110 F.2d 592

(1940). Even if the record demanded a finding that illumination of the 'tween deck space was inadequate, this Court should affirm the district court judgment unless it can affirmatively say that Judge Kilkenney committed "clear error" in holding that inadequate lighting did not contribute to Campbell's accident.

The testimony either supports the challenged finding of Judge Kilkenney, or at worst, is neutral upon an issue which Waterman had the burden of establishing by a preponderance of the evidence.

The only testimony concerning the role poor lighting might have played in the accident came from Campbell himself. As we have already seen, the workman had only the sketchiest recollection of the events preceding his accident. Campbell conceded that the 'tween deck space was not in darkness; although some areas were dim (R., Ex. 3, 17, 18). He testified that he "looked" around before starting to work (*id*, 25, 26) but the quality of this inspection is left wholly to surmise. Obviously it was not painstaking, or the missing hatch boards would have been discovered. But Campbell could not remember whether he inspected by walking around or by standing in one place; whether the inspection consisted of a quick "coup d'oeil" or a searching gaze; whether it embraced the entire area, or just a part (*id*, 23, 26). Men often look without seeing even in a well-lighted room, and this evidence constitutes a shaky foundation for an inference that Campbell failed to see the missing hatch boards because of bad lighting.

If Campbell had fallen into the hold space while

walking normally about the lower 'tween deck area, one might perhaps infer that poor lighting was a factor in his injury. But the accident did not happen in that way. Campbell's gang was on the lower 'tween deck to assist in removal of covers from the two aft deep tanks (R., Vol. 2, 7-10, Ex. 3, 24-25). The square tank covers are removed by means of a winch on the main deck. As a cover is raised, four gang members, one at each corner, steady and guide it. The approved, safe method of steadying the cover is for workmen to use "bull ropes" or "tag lines" attached to the corners. However, Campbell testified that the workmen sometimes used their hands, and he could not remember whether or not he was using a line on the occasion in question (R., Ex. 3, 33, 45-48, Ex. 32, 33-37).

Campbell was one of the men who was to help in guiding the first tank cover to be lifted. As the cover was raised, it started to swing. Campbell instinctively stepped backward to get out of the way, and fell into the opening created by the missing hatch-boards (R., Ex. 3, 35-39).

While he was at work on the tank cover, Campbell had no reason to look at the hatch floor, and was in fact facing away from it. Accordingly, an inference that inadequate lighting contributed to the accident would have to be based solely upon Campbell's failure to discover the missing hatchboards during his initial inspection of the lower 'tween deck space. The evidence concerning this inspection was, as we have seen, vague and inadequate.

CONCLUSION

Waterman failed to sustain its burden of proving that the lower 'tween deck was inadequately illuminated at the time of Campbell's accident. Even had the record required a finding that lighting was inadequate, the district court judgment should be affirmed. Judge Kilkeny's finding (R., Vol. 1, 22) that "lack of adequate lighting was not a causative factor in the workman's fall and resulting injuries" and his finding that Brady's negligence alone caused the accident, were not "clearly erroneous", and constituted in fact a correct analysis of the record before the court.

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APPENDIX OF EXHIBITS

All references are to Volume 2 of the Record
unless otherwise specified.

Exhibit No.	Description	Identified	Received
1	Pleadings in <i>Campbell v. Waterman Steamship Co.</i>	17-18	18
2	Release signed by B. T. Campbell	29	29
3	Deposition of Campbell	24	25
5	Portland loading records for January 24, 1961 (erroneously identified in tran- script as "Court records of Brady- Hamilton")		
6	Log of SS DE SOTO	28	28
7	Accident report, Matson Terminals, Inc.	13	13
8	Letter of September 13, 1963, Matson to Waterman	23	23
31	Stevedoring contract between Waterman and Matson	Pretrial Order	Vol. 1 38 (Order of Dec. 30, 1964)
32	Deposition of Glavanich and Deposition exhibits	31	34
32-1,2,3,4	Photographs of Accident Scene....	6-7	7

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RAYMOND J. CONBOY, Attorney